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Supreme Court of the United

OCTOBER TERM, 1988

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS,
ET AL.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE COUNCIL OF THE CITY OF NEW ORLEANS, *ET AL.* IN OPPOSITION TO THE VIEWS OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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BRIEF OF THE COUNCIL OF THE CITY OF NEW ORLEANS, *ET AL.* IN OPPOSITION TO THE VIEWS OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

This brief is submitted by the Council of the City of New Orleans ("Council") in opposition to the brief expressing the views of the Solicitor General on behalf of the United States and the Federal Energy Regulatory Commission ("FERC") as *amici curiae* (hereinafter referred to as "U.S. Br."). The brief of the Solicitor General contains five flaws fatal to its position that NOPSI's petition for review should be granted.

1. *The state court system can adequately address NOPSI's claims.* The Solicitor General has made no showing that the state court system cannot properly adjudicate NOPSI's claim that the Council's retail

level rate order is preempted by the FERC's wholesale level allocation of Grand Gulf costs. The Fifth Circuit found the local courts to be "fully able" to address such matters. App. 17A. The Louisiana courts have ably handled claims of federal preemption in the past. *See, e.g., Thibodeaux v. Thibodeaux*, 454 So.2d 813 (La. 1984), *cert. denied*, 469 U.S. 1114 (1985); *State v. Jenkins*, 107 So.2d 648 (La. 1958), *cert. denied*, 359 U.S. 998 (1959). "Minimal respect for the state processes . . . precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Middlesex County Ethics Committee v. Garden State Bar Association*, 102 S. Ct. 2515, 2521 (1982).[1] The Louisiana courts also are highly experienced in review of utility regulatory matters, and have not hesitated to overturn regulatory actions which they deemed inappropriate. *See, e.g., Central Louisiana Electric Co. v. Louisiana Public Service Commission*, 508 So.2d 1361 (La. 1987); *Gulf States Utilities Co. v. Louisiana Public Service Commission*, No. 325,224 (La. Dist. Ct. Feb. 18, 1988).

2. *There is ongoing state court litigation involving identical issues of law and fact.* This case is a paradigm for application of the *Younger*[2] abstention doctrine: the same preemption claim raised by NOPSI in its federal lawsuit currently is being considered by the Louisiana Court of Appeal for the Fourth Circuit

[1] The Solicitor General, without reference to record evidence, inappropriately ascribes bias to the Council's regulatory processes. *See* U.S. Br. at 12 n.12. If this were true, it is a matter that the state courts would be fully capable of addressing.

[2] *Younger v. Harris*, 401 U.S. 37 (1971). Abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is proper as well. *See* App. 17A.

on appeal of the denial of NOPSI's preliminary injunction motion[3] and is also before the Civil District Court for the Parish of Orleans as one issue in that court's in-depth review of the merits of the Council's Rate Order.[4] The state court system has this matter well in hand. There simply has not been a showing that it is appropriate for this Court to interrupt the state judicial process for reviewing retail level regulatory decisions.

The Solicitor General also overlooks the uncontroverted fact that state law issues form an integral part of NOPSI's state court lawsuit. Preemption is only one ground on which NOPSI has sought review of the Council's Rate Order, and the Council has raised several critical issues of state law in defense of its order. *See* Council's Brief at 11-12.

Younger abstention is based on a strong federal policy that the federal courts should not enjoin pending state court proceedings. *See Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519 (1987); *Ohio Civil Rights Commission v. Dayton Christian Schools*, 106 S. Ct. 2718 (1986). This is not a case of merely concurrent federal and state proceedings invoking considerations of "wise judicial administration" such as existed in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976). NOPSI has asked the federal courts to *enjoin* state judicial processes arising from the Council's Rate Order. Hence,

[3] Briefs have been filed and oral argument is scheduled for January 10, 1989.

[4] Dispositive motions and briefs have been submitted to the Civil District Court for the Parish of Orleans. Oral argument was held before the court on November 30, 1988.

"weightier considerations of constitutional adjudication and state-federal relations" are involved. *Id.* The Solicitor General's reliance on *Colorado River* (U.S. Br. at 10) is therefore misplaced.

3. *The Solicitor General previously has conceded that the comity considerations of Younger warrant abstention in these circumstances.* Two years ago, the Solicitor General took a significantly different position in a case presenting a similar factual setting. *See* "Brief for the United States and the Federal Energy Regulatory Commission as *Amici Curiae*" in *American Electric Power Co. v. Kentucky Public Service Commission*, No. 86-49, a copy of which is appended to the Solicitor General's current submission to the Court. In the *AEP* brief, the Solicitor General urged that the Court grant review in the *NOPSI I*[5] case, but not in *AEP*. In *AEP*, a state court had issued a judgment on the preemption claims as to which federal review also was sought and the matter was pending before a state appellate court. The Solicitor General stated that *AEP* was "not an attractive candidate for review" in part because the state judicial proceeding "injects comity considerations into *AEP*" which the Solicitor General did not believe existed in *NOPSI I*. *See AEP* Brief at 23 and 25 n. 16.[6]

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[5] *New Orleans Public Service Inc. v. Council of the City of New Orleans*, Civ. Action No. 85-3398 (E.D. La. dismissed Dec. 16, 1985), *rev'd*, 782 F.2d 1236 (5th Cir. 1986), *modified and withdrawn in part*, 798 F.2d 858 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1910 (1987).

[6] The Solicitor General alleges that the Court's denial of *certiorari* in *NOPSI I* was due to "procedural problems" which have now disappeared. U.S. Br. at 5, 19. Notably, in its *AEP* brief, the Government did not view those problems as barriers to the Court's acceptance of NOPSI's petition.

NOPSI's preemption claims are under consideration by the Louisiana courts, and the same respect for federal-state relations is appropriate here. Indeed, the two cases cited by the Solicitor General and NOPSI as favoring preemption of the Council's actions stand as models for the process urged by the Council and the Fifth Circuit, *i.e.*, initial state level review of regulatory decisions in state court with ultimate review by this Court if needed. *See Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S. Ct. 2428 (1988).

4. *The alleged conflict between the circuits has not intensified since this Court's consideration of the issue in NOPSI I in which certiorari was denied.* The Solicitor General fails to recognize that the alleged conflict in the circuits is no more pronounced now then it was when this Court denied *certiorari* in *NOPSI I*. Indeed, the same cases are cited by the Government in its *AEP* brief and its current submission.[7]

Furthermore, the abstention controversy alleged by the Solicitor General is not substantial. The lower federal courts, including the Fifth Circuit, have determined the propriety of abstention in the face of a preemption claim on a case-by-base basis. Close analysis of the cases reveals that when the courts are convinced that a *direct, facial* conflict exists between state and federal regulatory actions, they will not hesitate to exercise their jurisdiction. For example, *compare NOPSI I* and the decision below with *South Central Bell Telephone Co. v. Louisiana Public Service*

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[7] *Cf.* U.S. Br. at 16-18 to the Government's *AEP* Brief at 20-22.

Commission, 744 F.2d 1107 (5th Cir. 1984), *vacated and remanded on other grounds*, 106 S. Ct. 2884 (1986). *See also Aluminum Company of America v. Utilities Commission of the State of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), and *Appalachian Power Co. v. Public Service Commission of West Virginia*, 770 F.2d 159 (4th Cir. 1985).

5. *Federal court jurisdiction is not required to resolve the dispute between NOPSI and the Council.* The Solicitor General incorrectly assumes that the Council's Rate Order encompasses interstate issues and that federal court jurisdiction thus is mandated. In doing so, the Solicitor General confuses the issue of FERC jurisdiction over interstate wholesale power contracts with the issue of which court system—state or federal—must give effect to such determinations. The "filed rate doctrine"—*if* applicable to this dispute—is binding on the state courts. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981).

Moreover, no interstate effect will be felt from the Council's retail level order. The Council has *not* refused to honor the FERC allocation; to the contrary, it has taken express action to ensure that NOPSI can continue to meet its obligations to its wholesale supplier. *See* Council's Brief at 7-8. The Rate Order has been in place for nearly ten months, and NOPSI has continued to meet its Grand Gulf obligations during that time. No costs have been shifted to other jurisdictions. The order was designed to ensure NOPSI's solvency and ability to pay its share of Grand Gulf costs.

Indeed, it is extraordinary that the Solicitor General has taken on the role of NOPSI's champion with

respect to a matter the company has declined to pursue on its own behalf: the need for preliminary injunctive relief from the federal courts to avoid allegedly irreparable injury even if "limited" abstention is appropriate (U.S. Br. at 14). NOPSI's brief to this Court did not raise this issue, and NOPSI has never asked the state court for such relief. NOPSI's motion for a preliminary injunction in the state judicial system was based on an asserted right to an injunction as a matter of *law* based on the doctrine of federal preemption and presented absolutely no showing of harm, irreparable or otherwise.

The Council does not deny that NOPSI is entitled to "its day in court" on its claims of federal preemption. The matter on which the litigants disagree is which judicial system—state or federal—properly should review such allegations in the first instance, particularly when issues of great local concern such as those embodied in the Council's Rate Order are at stake. In *NOPSI I*, this Court declined to review the federal court's decision to abstain in such circumstances. No different result is warranted here.

Respectfully submitted,

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